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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

[redacted],

MAXWELL A. STURTZ, Trustee in Bankruptcy of AMPHITHEATRE, INCORPORATED,

[redacted]-*Petitioner*,

NEW YORK WORLD'S FAIR 1964-1965 CORPORATION,

Petitioner Below-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

In the Matter of

AMPHITHEATRE, INCORPORATED,

Bankrupt,

MAXWELL A. STURTZ, Trustee in Bankruptcy of AMPHITHEATRE, INCORPORATED,

Trustee-Petitioner,

NEW YORK WORLD'S FAIR 1964-1965 CORPORATION,

Petitioner Below-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To:

The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

Petitioner prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit (Waterman, C. J., Moore, C. J., and Bonsal, D. J., sitting by designation), entered herein on December 26, 1968, affirming a memorandum and order of the District Court for the Eastern District of New York (Dooling, D. J.) entered on February 29, 1968, which reversed a decision of Hon. Sherman D. Warner, Referee in Bankruptcy, awarding $250,000.00 to the trustee in bankruptcy.

Citations to Opinions Below

The interlocutory opinion of the United States District Court for the Eastern District of New York (Rosling, D. J.) is unreported and is printed *infra,* page 1a.

The decision of the referee in bankruptcy, Hon. Sherman D. Warner, is unreported and is printed, *infra,* page 49a.

The opinion of the United States District Court for the Eastern District of New York (Dooling, D. J.) is unreported and is printed, *infra,* page 37a.

The opinion in the Court of Appeals is reported in —— F. 2d —— and is printed, *infra,* page 136a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. Code Section 1254(1). The judgment of the Court of Appeals was entered on December 26, 1968.

Questions Presented

1. Whether as a matter of federal procedural law, the scope of review in the Court of Appeals, is the same as in the District Court, when the correctness of a Referee's finding of fact is at issue (as governed by General Order 47), or is it limited solely to the propriety of the District Judge's review (as governed by Federal Rule 52(a)).

2. Whether Federal Rule 52 (a) or General Order 47 permit the Court of Appeals and the District Court to wholly disregard and refuse to accept a Referee's findings of fact not specifically found to be clearly erroneous and make new and different findings.

3. Whether the Court of Appeals misconstrued and misapplied New York Real Property Law Section 233,

by characterizing the transaction between the parties as a *bona fide* loan rather than lease security within the purview of the New York statute.

Statutes Involved

The statutory provisions involved are Federal Rule of Civil Procedure 52(a), General Order in Bankruptcy 47, 11 U. S. C. A. following Section 53, and New York Real Property Law, Section 233. These provisions are reproduced in full, *infra*, p. 1-2b.

Statement of the Case

Respondent, New York World's Fair 1964-1965 Corporation (The Fair), as a landlord, by motion for summary judgment brought before a Referee in Bankruptcy, sought to recover possession of its building and damages from petitioner, as the trustee in bankruptcy of Amphitheatre, Inc. (Amphitheatre), as tenant. Amphitheatre, cross-moved for summary judgment for $250,000.00 on certain enumerated counterclaims, contending that a clause in the lease and subsequent transactions of the parties, which had provided for the purchase and retention by the landlord of its own unsecured promissory notes (Fair notes) as lease security, created a trust relationship within the purview of Section 233 of the New York Real Property Law, (2b, now General Obligations Law Section 7-103) and that the Fair, by applying the proceeds of said notes to its own use, violated said Statute.

Negotiations between the parties in February and March of 1961, for rental of the 1939-1940 World's Fair New York State Amphitheatre and Exhibition Building, wherein Amphitheatre wished to present an entertainment extravaganza during the 1964-1965 World's Fair, culminated in a

printed lease signed on May 5, 1961. Paragraph 41 of the said lease, so far as material, provided:

> "Within sixty days after the execution of this lease . . . (Amphitheatre) shall deposit with the Fair Corporation (and shall keep deposited throughout the Term) $250,000 principal amount of the Fair Corporation's 6% Promissory Notes, purchased from the Fair Corporation . . . as security for the full, faithful and prompt performance of, and compliance with, . . . all of the terms, covenants, agreements and conditions of this lease on its part to be performed, kept and observed. In the event that the Fair Corporation shall at any time or times so use the security or a part thereof (Amphitheatre) shall, on demand of the Fair Corporation and within two (2) days thereafter, deposit with the Fair Corporation additional Fair Corporation 6% Promissory Notes *or cash* so as to maintain the deposit at all times to the full amount of $250,000; all such additional security shall be subject to all the conditions of this Article. After the end of the Term and upon condition that (Amphitheatre) shall then be nowise in default . . . the Fair Corporation will return the security to (Amphitheatre), less the amount of any and all unpaid claims and damages of the Fair Corporation by reason of any breach or default by (Amphitheatre) under this lease or any part thereof." (Emphasis supplied.)

On February 8, 1965, an order was made by the Referee granting summary judgment to the Fair, awarding it possession of its building, and also to Amphitheatre, on its cross-motion based on its counterclaims, awarding Amphitheatre a judgment of $250,000.00 on the

theory that the transaction between the parties was intended to be security under the lease and within the purview of Section 233 of the New York Real Property Law (p. 2b).

Upon review by the Fair of the propriety of the Referee's order granting summary judgment in favor of Amphitheatre, the United States District Court, Eastern District of New York (Rosling, J.) in a decision dated April 27, 1965, (p. 1a) reversed the Referee, finding that:

> "These documents evince a sharp disagreement between the parties as to the central factual element, namely, whether the preliminary negotiations for the lease were sincere and genuine in their creation of a documented loan relationship between the parties or were a mere pretense designed to dress up a security transaction so that it would be masked as a loan from tenant to landlord, whereby the monies to the lessor's behoof might be freed of the non-waiverable trust restrictions imposed by law and be used without exposing the user to criminal sanctions". (p. 3a.)

Judge Rosling indicated that the motion for summary judgment which awarded Amphitheatre $250,000.00 was improperly granted because:

> ". . . the Referee could thus find and conclude only by preferring one inference drawn from the facts over another. To grant the motion for summary judgment he (the Referee) would have had to choose the inference that the lease provision and subscription agreement in their contextual frame were no more than a facade and fiction, and simultaneously to have rejected the inference that they were genuinely what they purported to be. *Such*

choice is reserved for the trier of the facts alone.'' (Emphasis supplied, p. 35a.)

Judge Rosling found the possible different factual inferences to be drawn from the documentary evidence, regarding the intent of the parties, to be in such significant conflict as to require his denying *both* the cross-motion of Amphitheatre for summary judgment, *and* rejecting the Fair's contention that the Amphitheater's claims be summarily dismissed (p. 36a). Judge Rosling held, that the Referee's fulcral finding that ''money . . . was *intended* to be . . . security under the lease is . . . erroneous both in assuming to adjudicate intent on a motion for summary judgment, and . . . in the absence of a showing, that the intent was other than as'' the Fair averred (pp. 35a-36a).

Subsequently, on remand, the Referee held a plenary trial in which he reevaluated the *same* documentary evidence and held comprehensive hearings. His assessment of the credibility of the various witnesses who appeared before him and the facts which he inferred therefrom [1] are set forth in his extensive decision containing, *inter alia,* thirty-seven (37) separate findings of fact (pp. 110a-122a).

The Referee specifically decided that the parties intended the transaction to be a lease security, and not, as the Fair contended, a *bona fide* loan, and granted judgment to Amphitheatre on its counterclaims (p. 118a). The

[1] "It is impossible to ascertain the intentions of the parties from the provisions of the lease, the subscription and the subscription agreement, insofar as they relate to security because their provisions are in conflict, they are not clear and unambiguous. The testimony of the parties in addition to these documents was needed to ascertain their true intent" (p. 135a).

Referee concluded that the controlling cases in which the facts established creation of *bona fide* loans were inapposite.

> "There was no authorization in Amphitheatre's lease for the Fair to use the security deposit for a specific purpose or for the peculiar or particular benefit of the tenant, nor is there any provision in the lease for the security to constitute a loan to the landlord.
>
> The Fair's contention that a loan was accomplished cannot be sustained because such alleged loan would be a violation of the non-waiver provision of the statute which prevents the creation of a debtor-creditor relationship by the deposit of tenant's security under the lease. Also for the same reason the Fair Corporation Notes issued in the name of Amphitheatre are not the security, but are merely further evidence of the amount of Amphitheatre's deposit under Article Forty-first of the lease" (p. 134a).

Review of the Referee's decision rendered after trial was taken by the Fair, resulting in the decision below. Judge Dooling completely disregarded Judge Rosling's prior holding, that the documents with regard to the intent of the parties, were ambiguous on their face and required testimonial explanation and the Referee's determination on the factual issue of intent of the parties. Notwithstanding his own concession, that the argument of Amphitheatre was "formidable", Judge Dooling inexplicitly held that:

> "The evidence incontrovertibly demonstrated that the true intent of the parties was truly expressed in their contract" (p. 40a).

In doing so, the District Judge wholly ignored the Referee's factual findings and made *de novo* factual find-

ings of his own by drawing different inferences from the same basic facts solely from the stenographic record of the plenary trial conducted by the Referee. In arriving at his own factual conclusions he did not specifically find the Referee's findings of fact, material to his decision, to be clearly erroneous.

The District Judge reversed the Referee's decision, made after trial, that the transaction between the parties was intended to be lease security, and found that the transaction was intended as a *bona fide* loan, and that there was no breach of a statutory trust (p. 48a).

The Court of Appeals affirmed, after making its own factual inferences, explaining that while it recognized that "the deposit of notes was made as security for the performance of the lease, . . ." (p. 139a) still "[t]here never could have been any *intention* that the Fair would hold the money paid for the notes as security." (p. 141a, Emphasis supplied).

In failing to reverse the District Judge, who had patently disregarded and violated the proscriptive mandate of General Order 47, the Court of Appeals compounded the error made below, and itself manifestly ignored same and the analogue rule of F. R. C. P. 52(a).

Reasons for Granting the Writ

1. The Court of Appeals has in effect reaffirmed an important theory of federal procedural law concerning the scope of review to be accorded the findings of a referee in bankruptcy, which have been set aside or rejected by a District Judge. This issue has not been, but should be, settled by this Court.

Consistent with its precedent, which is the prevailing majority view amongst the Circuits, the Second Circuit,

in acting upon petitioner's appeal, applied the theory that, when the correctness of a Referee's finding is at issue the question is *the same* in the Court of Appeals as it is in the District Court. (*Morris Plan Industrial Bank* v. *Henderson,* 131 F. 2d 975 (2 Cir. 1942); *Mergenthaler* v. *Daily,* 136 F. 2d 182 (2 Cir. 1943); *Knetzer* v. *Larkin,* 178 F. 2d 532 (2 Cir. 1949); *Matter of Herman Tabibian,* 289 F. 2d 793 (2 Cir. 1961); *Phillips* v. *Baker,* 165 F. 2d 578 (5 Cir. 1948); *O'Reiley* v. *Endicott-Johnson Corp.,* 297 F. 2d 1 (8 Cir. 1961); *Potucek* v. *Cordeleria Lourdes,* 310 F. 2d 527 (10 Cir. 1962); *Washington* v. *Houston Lumber Co.,* 310 F. 2d 881 (10 Cir. 1962); *cert. denied,* 372 U. S. 930 (1962); *Cf. Moran Bros., Inc.* v. *Yinger,* 323 F. 2d 699 (10 Cir. 1963).

A minority view asserts and subscribes to a theory, that in such a situation the proper and better rule to be followed is, that only the action taken by the District Judge, and not by the Referee, is to be reviewed by the Circuit Court. *In re Duvall,* 103 F. 2d 653 (7 Cir. 1939); *Mountain Trust Bank* v. *Shifflett,* 255 F. 2d 718 (4 Cir. 1958); *Matter of Arbycraft Co.,* 288 F. 2d 553 (3 Cir. 1961).

It is apparent that the rationale of the scope of review accorded by the Second Circuit Court of Appeals in the instant case, which is followed by the 5th, 8th, and 10th Circuits, is in direct and acknowledged conflict with the rationale applied by the 3rd, 4th and 7th Circuits, to an identical situation. (2 Collier on Bankruptcy, 14th Ed., 953; Compare, *Stewart* v. *Ganey,* 116 F. 2d 1010 (5 Cir. 1940), *rehearing denied* (1941).

The Ninth Circuit feels, however, that some judicial restraint should be exercised in this area. (*Olympic Fin. Co.* v. *Thyret,* 337 F. 2d 62 (9 Cir. 1964); *Costello* v. *Fazio,* 256 F. 2d 903 (9 Cir. 1958).

2. The Court of Appeals in the instant case, has wholly disregarded a basic juridical *caveat,* that appellate courts should not act in a manner as to permit a trial *de novo.* (See, F. R. C. P. 52(a), *infra* 1b).

> "The mere fact that one or more of the members of this Court might have made opposite findings if sitting at *nisi prius* does not of course serve to justify reversal of a District Court's findings under the 'clearly erroneous' rule." (*U. S.* v. *Singer Mfg Co.,* 374 U. S. 174 (1963) dissenting opinion of Harlan, J. at p. 202).

This situation is due to the long established principle that the Court who has seen and heard the testimony of witnesses is in a better position to judge their credibility and the weight to be attached to their testimony, than is a review court with nothing before it but the printed record.

Disregard of the above *caveat* by the Court of Appeals is magnified in the case at bar because the Referee's ultimate findings consisted of factual deductions and inferences from basic facts not in dispute. Accordingly, it would appear that General Order 47 (*infra,* 1b), promulgated by this Court, (such findings of fact shall be accepted "unless clearly erroneous") places more emphasis on the acceptability of Referee's findings in such situations (See, 2 Collier on Bankruptcy, 14th Ed. 1502), than was accorded its predecessor, prior to its 1939 revision, which had provided that "the reports of referees in all cases and proceedings in bankruptcy shall be deemed presumptively correct, . . . ".

Acting indifferently to F. R. C. P. 52(a) and General Order 47, the Court of Appeals made *de novo* factual findings upon the same record, absent the benefit of observation or hearing of witnesses, and held "[t]here

could never have been any intention that the Fair would hold the money paid for the Notes as security" (p. 141a), notwithstanding the Referee's specific finding to the contrary (p. 118a, F24).

The unorthodox method used by the District and Circuit Courts was inappropriate and erroneous considering the prior decision of Rosling, J., who had remanded the proceedings to the Referee for the very reason that the issues "of motive and intent" required a plenary fact finding trial (p. 3a).

3. The Court below, in applying its rule of appellate review in a situation where the Referee's findings have been reversed by the District Court, thus examining only the correctness of the Referee's finding, and not the District Court's, has manifestly ignored F. R. C. P. 52(a) and the plethora of case law fashioning the latitude and extent of appellate judicial review, as enunciated by this Court, and other Circuits.

The Court of Appeals, in utter disregard of the mandate of F. R. C. P. 52(a), approved the District Court's unauthorized fact finding procedure and relegated to itself the unwarranted right to conduct a trial *de novo:* The District Court and the Court of Appeals did not specifically find the referee's findings clearly erroneous. They simply ignored the Referee's ultimate finding of fact as to intent. Such a procedure is destructive of the appellate judicial system and confusing to litigants. It assuredly presents an excellent case for supervision by this Court.

Moreover, the resultant decision of the Court of Appeals is out of step with its own recent decision, *In Re Ostrer,* 393 F. 2d 646 (2 Cir. 1968), reversing and remand-

ing a matter because the findings of the referee in bankruptcy, that the bankrupt's financial statement, although erroneous, was not published with any intent to deceive or defraud his creditors, had not been found erroneous by the District Judge. It is also contrary to the Court's own earlier decision in *Margolis* v. *Nazareth Fair Grounds and Farmers Market, Inc.*, 249 F. 2d 221, 223 (2 Cir. 1957), where Judge Lumbard, speaking for the Court, held:

> "The findings of fact of a referee in bankruptcy will not be disturbed unless they are "clearly erroneous." General Order in Bankruptcy 47, 11 U. S. C. A. following §53.[1] This requirement of Order 47 "has been strictly enforced in this circuit, especially where credibility is a key factor." In *Matter of Nemerov*, D. C. S. D. N. Y. 1955, 134 F. Supp. 678, 681. Here the facts were in dispute and the findings of the referee based in part on his judgment of the credibility of the witnesses who testified before him must be given great weight. See *Rasmussen* v. *Gresly*, 8 Cir., 1935, 77 F. 2d 252, 254, wherein Judge Sanborn said, "A different rule would virtually make * * * a trial de novo."

4. This Court should settle the corrollary question of the weight, if any, the Court of Appeals must attach to the findings of the District Court where such findings were contrary to those of the Referee in Bankruptcy, before whom the testimony was heard, particularly, as here, where the findings of the Referee are based in part upon inferences and deductions from undisputed basic facts.

The presumptive weight, if any, to be accorded either the District Judge's contrary findings or the Referee in Bankruptcy's findings, would be dependent upon the

theory of whether one or the other, or both, are to be examined. (See opinion of Parker, J., in *Mutual Savings & Loan Ass'n* v. *McCants,* 183 F. 2d 423, 426 (4 Cir. 1950).

If F. R. C. P: 52(a) were the guide, it would appear that the doctrine of this Court, as enunciated in *Commissioner* v. *Duberstein,* 363 U. S. 278 (1960), by Mr. Justice Brennan would be controlling. In that case, the Tax Court had sustained the Commissioner's ruling that certain property had not been acquired by gift. The Sixth Circuit treating the Tax Court decision as a *legal conclusion not within the ambit of Rule 52(a),* drew a contrary inference from the evidentiary facts and found for the taxpayer. This Court reinstated the Tax Court decision. Mr. Justice Brennan, for the Court, stated the reasons for applying the "clearly erroneous" test to the findings of the Tax Court:

> "Decision of the issue presented in these cases must be based ultimately on the application of the fact finding tribunal's experience *with the mainspring of human conduct to the totality of the facts of each case.* The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirms us in our conclusion that *primary weight in this area must be given to the conclusion of the trier of fact.* (Emphasis supplied).
>
> * * *
>
> "One consequence of this is that appellate review of determinations in this field must be quite restricted. * * * Where the trial has been by a

> judge without a jury, the judge's finding must stand unless 'clearly erroneous.' Fed. Rules Civ. Proc. 52(a). * * * *The rule itself applies also to factual inferences from undisputed basic facts* * * * as will on many occasions be presented in this area * * * And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court. I. R. C. §7482(a)." (Emphasis supplied).

The Court expressly disapproved prior authority to the contrary.

In the instant case, this Court in promulgating General Order 47, has also in most explicit terms attached the identical weight to the findings of a referee in bankruptcy.

5. After Judge Rosling reversed summary judgment and remanded the issues for a plenary trial, the Referee held such a trial and found facts based upon the evidence. His findings are amply supported by the evidence adduced before him and are logical and properly based upon his judgment as the trier of the facts and the assessor of the credibility of the witnesses. The Referee's resolution on the issue of intent was fully supported as shown by the following analysis of his opinion.

Paragraph Forty-first of the lease dated May 5, 1961, required repayment of the security at the end of the term, the final day of the Fair in 1965 (p. 110a, F. 1-2). The Fair notes purchased by Amphitheatre were payable on August 1, 1966 more than nine months after the end of the lease (p. 116a, F. 12). The subscription to said notes was signed by the president of Amphitheatre, Davis, on June 21, 1961, who added in his handwriting the legend "In accordance with the agreement of May 5, 1961" (p. 113a, F. 5).

The foregoing when coupled with Davis' testimony, that he "intended it to mean that this subscription was in accordance with the paragraph of the lease which called for us to purchase these bonds or notes" (p. 86a), and findings referred to *supra*, led the Referee to the inescapable inference which he sets forth as follows:

> "Amphitheatre was required to pay $250,000. to Fair Corporation to purchase notes, to be used as security under the lease, and the repayment of that $250,000 was the Fair Corporation's obligation subject only to the terms of Article Forty-first of the lease. The payment was not intended by Amphitheatre to be an investment in the Fair Corporation's enterprise." (p. 118a, F. 24).

It is self-evident and implicit in this Finding, that the Referee determined that *even though Amphitheatre agreed to the terms* [2] imposed by the Fair to change the form of security from a cash deposit to the purchase of the Fair notes, that it did so with the full expectation of receiving repayment of $250,000 at the end of the term of said lease and that the subscription was intended merely to fulfill its obligations under said paragraph Forty-first.

After the execution of the lease on May 5, 1961, the Fair discovered that it could not obtain the full cash proceeds for its notes within sixty days, because the note issue was not available, and, more importantly, because the subscription therefor provided for the payment of forty per cent. down and the balance in equal installments

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[2] "Amphitheatre through its promoters agreed to these provisions but we must not overlook the fact that the reason it signed the subscription was to comply with the provisions of Article Forty-first of the lease, not for the reason, as the Fair Corporation would have us believe, of investing in Notes as a loan to the Fair Corporation." (p. 129a).

over three years. Thereupon, the Fair formulated the manner whereby it became possible to obtain the cash from Amphitheatre at the earliest moment.

This intent of the Fair is specifically found by the Referee in Finding 19, which states:

> "The modification of Article Forty-first of the lease by letter agreement dated July 10, 1961 and the amendment of the subscription agrement dated August 1, 1961, were made with *the intent on the part of the Fair corporation* to obtain the full sum of $250,000 from Amphitheatre at the earliest possible date and said sum of $250,000 was actually so paid by Amphitheatre and received by the Fair corporation" (Emphasis supplied; 117a).

This intent is emphasized by the testimony of Harold Weinstein, (an attorney who represented the Fair) who explained the reason for the July 10th letter and Amendatory Agreement No. 3 as follows:

> "One was to permit them to deposit *moneys* to pay for the notes, but the notes would not be delivered until a later date" (Emphasis supplied; 97a).
>
> * * *
>
> ". . . and then at the same time we proceeded to amend the subscription agreement to permit a subscriber to pay for all of his notes at one time, and get all of his notes if he so wished" (97a-98a).

The foregoing was undoubtedly a major consideration for Referee's Finding 32, reading as follows:

> "32. The letter agreement of July 10, 1961 was a means devised by the Fair Corporation to overcome the provisions of Article Forty-first of the

> lease that required a deposit of security within sixty days after its execution, and was also devised to circumvent the provisions of the subscription agreement that required installment payments at that time. The letter agreement anticipated the Amendatory Agreement No. 3 which became effective on August 1, 1961'' (p. 120a).

These facts logically and understandably led the Referee to the conclusion that the parties *intended* their agreement to be for lease security.

Yet, without any new evidence or testimony, both the District Court and the Court of Appeals found as a matter of fact that the parties *intended* to transact a loan.

6. Moreover, *all* the Referee's findings, read in their context, indicate that there was no *agreement* between the parties to use the security deposit for any specific purpose, or for that matter, for any purpose expressly related to the lease. Judge Dooling, however, completely disregarded the plain inference which the Referee drew from his findings, and made *new findings of fact* that ''[t]he Note issue loan, of which the Amphitheatre money was to form a part, was, *as the parties recognized,* to pay the Fair's cost of construction and pre-opening expenses . . .'' and that ''[t]he Note issue was the *sine qua non* of the whole Fair venture and indispensable to Amphitheatre's entertainment project'' (Emphasis supplied; p. 32a). This *de novo* finding or inference made by Judge Dooling is diametrically opposed to the not ''clearly erroneous'' findings and inferences made by the Referee. (See: p. 115a, F. 9; p. 115a, F. 10; p. 116a, F. 11; p. 116a F. 12; p. 117a, F. 19; p. 118a, F. 21; p. 118a, F. 24; p. 120a, F. 32; p. 121a, F. 33; p. 121a, F. 34.)

Judge Dooling also considered of little moment "the interest point" (p. 47a). The Judge obviously misconstrued the implications inherent in the payment of interest by Amphitheatre. The Referee had found:

> "That in addition to the $250,000 received for the issuance of promissory notes the Fair Corporation also received interest of $1,125 on the $150,000 note made by Amphitheatre, although deferred payments under the subscription agreement did not bear interest" (p. 112a, F. 34).

According to paragraph Forty-first of the lease Amphitheatre was required to buy Fair notes within sixty days after the making of the lease or by July 5, 1961. At that time, the Fair notes could not be purchased because of two impediments: (1) the $25 million quota had not been reached; (2) the subscription by its terms could not be paid for in full, as it required a down payment of 40% or $100,000, and payments of 20% or $50,000 in each of three ensuing years. But despite these impediments the Fair demanded and received Amphitheatre's note for $150,000 bearing 6% interest from July 5, 1961 until the due date of payment, payable to the Fair.

On July 14, 1961, the subscription quota was reached and the Fair could use $100,000. paid to it by Amphitheatre on that day in part payment under the subscription made by Amphitheatre.

However, it was not until August 1, 1961 that the Fair passed an amendment (Amendatory Agreement No. 3) which gave an "option" to all subscribers to pay the balance in full at any time after that date.

The subscription agreement did not require payment of interest on the deferred installments, but, bearing in mind that the *intent* as found by the Referee was that

Amphitheatre was obligated to pay to the Fair $250,000. within sixty days after the execution of the lease, or by July 5, 1961, the Fair exacted from Amphitheatre interest from that date on $150,000. to the date of payment, in total disregard of the subscription. There was no authorization for prepayment until August 1, 1961. Neither Amendatory Agreement No. 3 nor the Subscription Agreement required interest from those subscribers who *elected* to prepay their balance in full. The interest charge compels only one conclusion, that the Fair considered the money as security and not the notes which said money purchased. In accordance with the intent that the money had to be paid by July 5, 1961 (60 days after the making of the lease), the Fair charged interest for this late payment of money which it intended to receive in full by July 5, 1961.

Clearly, the payment of interest by Amphitheatre, *the purported lender,* indicates that the transaction, which was ostensibly a loan, was in reality a security deposit made by Amphitheatre to the Fair within the purview of N. Y. R. P. L. §233.

The Referee evidently evaluated all testimony, observing that Mr. Weinstein stated it was a business matter on which he would not have made a decision, he didn't remember who gave him instructions about the interest, he didn't know why Amphitheatre had to pay interest and nobody ever told him why it was inserted in the July 10th letter, and, although it had been prepared at Mr. Witt's suggestion, he never asked him the reason therefor (pp. 105a-6a).

It is quite evident from the foregoing that the Referee's findings of fact were not clearly erroneous, yet the District Court in reversing the Referee did not accept them, but drew factual inferences different from those made by

the Referee. In affirming the District Court's order, the Court of Appeals compounded this error.

7. The case below uniquely lends itself to be decided by this Court. Judge Rosling's interlocutory decision had obviated the insoluble appellate problem of characterizing the Referee's findings as either a "question of law" or a "mixed question of law and fact". Judge Rosling remanded the matter for plenary trial of an issue of pure fact. The issue to be determined was the *intent* of the parties as to whether the transaction was a *bona fide* loan or intended to be lease security. Absent also is the problem of whether the District Court or the Court of Appeals has departed from or applied a correct legal standard to the facts in determining the issues on appeal or review. (See, *U. S.* v. *General Motors Corporation,* 384 U. S. 127, 141-142 (1966).

The variance with other Circuits in this area of the law is self-evident from even a cursory examination of some recent decisions. In *Raulie* v. *U. S.,* 400 F. 2d 487 (10 Cir. 1968), the Tenth Circuit refused to disturb the finding of *intent* made by the Trial Court, that it was never agreed or intended by the parties that a deed was to act as a mortgage. In *Porterfield* v. *Gerstel,* 249 F. 2d 634 (5 Cir. 1957), the Fifth Circuit, refused to disturb findings of lack of *fraud* made by the referee in bankruptcy and affirmed by the District Court, and in *Bazemore* v. *Stehling,* 396 F. 2d 701 (5 Cir. 1968) it reversed a District Court which had overruled a Referee's finding made on the issue of *reliance.* Issues of *intent, reliance,* and *fraud* are pure questions of fact and accordingly should not be disturbed on review unless "clearly erroneous," meaning, that the reviewing court is of "the definite

and firm conviction that a mistake has been committed''. (*U. S.* v. *U. S. Gypsum Company*, 333 U. S. 364 (1955).)

This case involves pure questions of fact, thus, the decisions below are unjustifiable and present an excellent opportunity to this Court, both to rectify a wrong and to clarify the role of the Appellate Courts in this area.

8. In 1935, New York State enacted Section 233 of the New York Real Property Law to absolutely prevent landlords from using money, deposited by tenants as security under leases, for any other purpose. Since then, New York has amended this law several times to broaden its coverage and effect. Yet the Court of Appeals in the instant case has disregarded the plain meaning of this statute, and all the subsequent judicial interpretations made thereon, and has attempted to legislate a wholly new law for New York. Left standing, the Court of Appeals' holding will constitute respected opinion for permitting unscrupulous landlords to do indirectly that which they are forbidden to do directly, and emasculate and mutilate the New York Statute which was enacted for the special benefit of tenants, a result clearly at variance with New York law and public policy.

Only a handful of cases have arisen in New York where it has been determined that the landlord and tenant successfully created a *bona fide* loan arrangement. These cases, discussed at length in the Referee's opinion (pp. 131a-4a), construed Section 233 of New York Real Property Law to be inapplicable to situations where the lease not only evidenced the parties' clear and unambiguous intention to create a loan but also provided a specific purpose and use for the loaned money. (Compare, opinion of Dooling, J., pp. 41a-2a).

In the instant case, the Circuit Court concluded "that bona fide loan arrangements between landlords and tenants, *at least which relate to the leased premises,* do not violate Section 233 when the money is used to acquire title to or benefit the leased premises" (p. 141a, Emphasis supplied). In merely requiring the loan transaction to "relate" to the leased premises, the Court of Appeals has liberalized and misapplied the law of the State of New York.

Here the lease provision relating to security (Paragraph 41, *supra,* Petition p. 4) is barren and devoid of any mention of a *specific purpose* or *use* that the alleged loan was sought to accomplish relative to the specific building leased.

In order to support their respective decisions, both the District Court and the Court of Appeals, erroneously looked beyond the four corners of the lease, in order to find a loan for a specific purpose and use. These *de novo* deductions and inferences, were contrary to the [redacted] of the Referee, and resulted in misapplication of the New York statute.

Moreover, there was no testimony in the record to support a finding regarding an *agreement* between the parties as to a loan. On the contrary, all evidence indicates that the negotiations concerned themselves solely with security for Amphitheatre's performance of the lease.

This liberalization in favor of landlords is contrary to the strict application of the statute by New York Courts and totally destroys its remedial purpose and effect. The non-waiver provision, that voids any agreement involving lease security, made to evade the creation of a trust for the benefit of the lessee, was enacted to prevent tenants from contracting out of the statute and requires strict construction.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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